SCHALLER, J., dissenting. Although I agree with the majority's resolution of the claim of prosecutorial impropriety, I respectfully disagree with the resolution of the evidentiary claim by the defendant, Jose G. In my view, the defendant adequately preserved and presented his claim for our review under the circumstances of this case. I am persuaded that the admission of testimony about alleged incidents of uncharged sexual abuse was improper and harmful. As a result, I would reverse the judgment of the trial court and order a new trial.

I

I begin by addressing the procedural history of the defendant's evidentiary claim. The majority declines to review the defendant's claim on two grounds, namely, failure to preserve the issue at trial and failure to raise the issue in his main brief. As to the first ground, the majority correctly notes that defense counsel objected initially that the question was leading. The state argued in response that the evidence was offered to establish constancy of accusation. After the prosecutor rephrased the question, defense counsel objected again by stating, "[t]hat's not specific enough. He gave her the dates." Defense counsel also argued that the prosecutor had "named every month and year until [the witness] said yes." After further argument, the court excused the jury and held a hearing on the admission of the testimony as constancy of accusation. Specifically, the court stated: "All right, voir dire. Constancy of accusation."

During the proceeding outside of the presence of the jury, the witness, J, testified that the victim had told her that the defendant sexually assaulted her two weeks before March 6, 2002. According to J, the victim also indicated that the defendant had sexually assaulted her six months before, in October or November, 2001. At the conclusion of the hearing, the court overruled the defendant's objection, stating: "All, right, but she cannot go into any specific indications, just that he forced her to have sex; that's what she told her on two occasions." In other words, the court admitted the challenged testimony into evidence as constancy of accusation. After ruling on the admission of the testimony as constancy of accusation, the court confused the situation by adding the ambiguous observation: "The reason I'm allowing this in is because of this claim that the testimony she gave here in court ought to be disbelieved because of the statement she made earlier," referring to the written statement the victim had made to the police, which had been admitted into evidence pursuant to *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598

(1986). This comment raised, for the first time, the possibility that the court may have had in mind admitting the challenged testimony as evidence of impeachment, rather than constancy of accusation.

As the majority notes, the defendant at no time objected to the proposed evidence as improper impeachment. The state, however, at no time offered the evidence as impeachment evidence. From my review of the transcript, the court appeared to have understood that the basis for the offer was constancy, and both the prosecutor and the court addressed the offer as constancy of accusation.[1] Although it is also true that the defendant at no time objected to the testimony as improper constancy evidence, such an objection would have been futile in view of the court's ultimate ruling, after trial, that the testimony was admitted as impeachment evidence. In view of the procedural history, the defendant cannot be faulted for failing to preserve the evidentiary issue in the traditional manner. Because the evidence eventually was deemed by the court as impeachment evidence, rather than as constancy evidence, the defendant had no reason at the critical moment during the trial to object on the basis of impeachment. An objection based on constancy would not have accomplished any purpose in view of the ultimate ground for admission.

Under these circumstances, the defendant should not be penalized for failing to offer an objection on a ground that, at the time, had not been raised. "Practice Book § 288 [now § 60-5] provides in pertinent part that [w]henever an objection to the admission of evidence is made, counsel shall state the grounds upon which it is claimed or upon which objection is made, succinctly and in such form as he desires it to go upon the record, before any discussion or argument is had. . . . [Our Supreme Court has] noted that [t]he purpose of the rule requiring that an exception be taken that distinctly states the objection and the grounds therefor is to alert the court to any claims of error while there is still an opportunity for correction. . . . This rule is essential to avoid trial by ambush [of the presiding judge and the opposing party]." (Citations omitted; internal quotation marks omitted.) *State* v. *Paulino*, 223 Conn. 461, 476, 613 A.2d 720 (1992). Put another way, "[a]ppellate review of evidentiary rulings is ordinarily limited to the specific legal [ground] raised by the objection of trial counsel." (Internal quotation marks omitted.) *State* v. *Marshall*, 87 Conn. App. 592, 598, 867 A.2d 57, cert. denied, 273 Conn. 925, 871 A.2d 1032 (2005); see also *State* v. *Christiano*, 228 Conn. 456, 464, 637 A.2d 382, cert. denied, 513 U.S. 821, 115 S. Ct. 83, 130 L. Ed. 2d 36 (1994). A necessary corollary, however, to that general rule is that, given an unusual situation, this court may review such claims outside the scope of the legal ground presented to the trial court. In my view, such a unique situation occurred in the present case.[2]

I conclude that it is sufficient under these circumstances that both the state and the trial court were put on notice that the defendant objected to the evidence. Additionally, I note that "[w]here . . . there is a question as to whether the claim was preserved, as long as it is clear from the record that the trial court effectively was alerted to a claim of potential error while there was still time for the court to act . . . the claim will be considered preserved." (Citation omitted; internal quotation marks omitted.) *State* v. *Francis D.*, 75 Conn. App. 1, 8–9, 815 A.2d 191, cert. denied, 263 Conn. 909, 819 A.2d 842 (2003). Because the defendant objected to the evidence, and the court, sua sponte, changed, in its later articulation, the ruling for which it was admitted, I would conclude that the defendant's claim was preserved properly.

I now turn to the second ground offered by the majority to decline to address the merits of the defendant's evidentiary claim, namely, the defendant's failure to raise the issue in his main appellate brief. The following background information is necessary to explain my disagreement with the conclusions reached by my colleagues. In his main appellate brief, the defendant claimed that the court improperly admitted the testimony of J and Stamford police Officer Sandra Conetta as constancy of accusation testimony. The state argued in its brief that this claim was not reviewable because the record indicated that the court admitted the testimony for impeachment and not as constancy of accusation testimony.

In his reply brief, the defendant conceded that the court ultimately deemed that it had admitted the testimony for impeachment purposes. He argued, nonetheless, that the evidence was admitted improperly because it constituted extrinsic evidence on a collateral issue and that it was more prejudicial than probative. On the issue of reviewability, the defendant argued that he did not have the opportunity to respond to the issue of impeachment until the court issued an articulation in January, 2006, after his main appellate brief was filed. The state argued that the defendant's attempts to raise this issue in his reply brief are improper and, as such, we should not review this claim.

On May 9, 2005, the defendant filed a motion for articulation, requesting the court to articulate the basis for admitting the challenged testimony, as well as other evidence including expert testimony related to battered woman's syndrome, which the state had proffered at trial.[3] The court denied that motion, and, on June 2, 2005, the defendant filed a motion for review with this court. On July 19, 2005, we granted the motion as to the ruling admitting expert testimony, but denied it as to the other requests.

On September 22, 2005, the defendant filed a request

pursuant to Practice Book § 64-1, seeking a signed transcript or memorandum of decision from the trial court with respect to, inter alia, the court's ruling to admit evidence related to claims of uncharged misconduct against him. The defendant submitted his main appellate brief to this court on November 21, 2005. On January 3, 2006, the trial court issued a memorandum of decision on the admission of evidence related to claims of uncharged misconduct against the defendant. In that decision, the court asserted that the evidence was admitted as impeachment evidence of the victim's trial testimony.[4] The state filed its appellate brief on May 10, 2006.

At oral argument before this court, the state argued that the reasoning for the trial court's ruling was not ambiguous and that the defendant should have briefed the impeachment issue in his main appellate brief. Without abandoning its position that the claim is not reviewable, the state requested permission to present a full written brief on the substantive merits of the issue. On January 16, 2007, we granted the state's request to file a supplemental brief, which the state filed on January 31, 2007.

I am mindful of the well established principle "that arguments cannot be raised for the first time in a reply brief. . . . Claims of error by an appellant must be raised in his original brief . . . so that the issue as framed by him can be fully responded to by the appellee in its brief, and so that we can have the full benefit of that written argument. Although the function of the appellant's reply brief is to respond to the arguments and authority presented in the appellee's brief, that function does not include raising an entirely new claim of error." (Internal quotation marks omitted.) *State* v. *Howard F.*, 86 Conn. App. 702, 708, 862 A.2d 331 (2004), cert. denied, 273 Conn. 924, 871 A.2d 1032 (2005).

Here, the defendant's argument in his reply brief does not present an entirely new claim of error. As noted previously, it is my position that the defendant properly preserved the issue under the circumstances at trial by objecting to the testimony at each juncture, and he set forth in his main appellate brief the claim that the evidence was admitted improperly. My review of the record supports the view that the defendant, understandably, was misled by the court's perplexing ruling on the admissibility of the evidence during trial and was not apprised adequately of the specific ground on which the court relied until the court issued its January 3, 2006 articulation. When the state responded to the defendant's main appellate brief on May 10, 2006, the state had the benefit of the court's decision, which the defendant did not. Also, the state requested the opportunity to respond to the argument raised in the defendant's reply, and we granted the state leave to file a supplemental brief. As such, the state has not been

denied the opportunity to present its written argument to us with respect to the merits of the claim.

Exceptional circumstances may persuade us to consider an issue raised for the first time in a reply brief. See *State* v. *McIver*, 201 Conn. 559, 563, 518 A.2d 1368 (1986) (permitting appellant to raise issue for first time in reply brief because record adequately supported claim defendant had been deprived of fundamental constitutional right and fair trial); see also *Curry* v. *Burns*, 225 Conn. 782, 789 n.2, 626 A.2d 719 (1993) (permitting appellant in reply brief to join amicus curiae request to overrule prior case law); *37 Huntington Street, H, LLC* v. *Hartford*, 62 Conn. App. 586, 597 n.17, 772 A.2d 633 (addressing issue raised in reply brief where appellant had no earlier opportunity to respond to issues raised in briefs filed by amici curiae), cert. denied, 256 Conn. 914, 772 A.2d 1127 (2001). These are exceptional circumstances. As I will discuss, the issue presented is of sufficient magnitude to warrant reversal of the judgment. The strength of the defendant's claim in light of the confusing procedural history of this case constitutes circumstances that, in fairness, demand our review of the merits of the claim. I conclude that the defendant's claim is properly before this court.

II

I now turn to the merits of the defendant's claim, which is based on the court's ultimate ruling that the evidence was admitted for the purpose of impeachment. In its January 3, 2006 memorandum of decision, the court explained that because the victim's trial testimony and prior *Whelan* statement were in total conflict, the jury had to decide which version or portions of which version to credit. The court effectively permitted the state to present testimony from two witnesses, J, a friend of the victim, and Conetta, the Stamford police officer, that the victim told each of them that the defendant had sexually abused her on previous occasions in order to impeach the victim's trial testimony and to bolster the credibility of her *Whelan* statement. The court, therefore, admitted extrinsic evidence of the victim's prior inconsistent statements to impeach her trial testimony.[5]

"Where a party seeks to impeach a witness by using extrinsic evidence, certain standards must be met. The inconsistent statement must be relevant and of such a kind as would affect the witness' credibility, and, generally, a foundation for introducing the statement should be laid at the time of [the examination] of the witness." (Internal quotation marks omitted.) *State* v. *Ward*, 83 Conn. App. 377, 393, 849 A.2d 860, cert. denied, 271 Conn. 902, 859 A.2d 566 (2004). "[*T*]*he foundation for introducing a prior inconsistent statement is laid by asking the witness . . . whether* [*the witness*] *made the statement and alerting* [*the witness*] *to the time and place at which it was made. . . .* Where the

witness denies having made the statement or is unable to recall having done so, extrinsic evidence may be admitted to show it was made." (Citations omitted; emphasis added.) *State* v. *Butler*, 207 Conn. 619, 626, 543 A.2d 270 (1988).

Although such a foundation should be established, we have no inflexible rule regarding the necessity of calling the attention of a witness to her alleged prior inconsistent statements before introducing extrinsic evidence tending to impeach her. *State* v. *Saia*, 172 Conn. 37, 46, 372 A.2d 144 (1976). Our rules of evidence provide that "[i]f a prior inconsistent statement made by a witness is not shown to or if the contents of the statement are not disclosed to the witness at the time the witness testifies, extrinsic evidence of the statement is inadmissible, *except in the discretion of the court*." (Emphasis added.) Conn. Code Evid. § 6-10 (c); see *State* v. *Daniels*, 83 Conn. App. 210, 215, 848 A.2d 1235, cert. denied, 270 Conn. 913, 853 A.2d 528 (2004).

"As a general rule, extrinsic evidence of a prior inconsistent statement may not be admitted to impeach the testimony of a witness on a collateral matter. . . . Thus . . . a witness' answer regarding a collateral matter is conclusive and cannot be contradicted later by extrinsic evidence. . . . Extrinsic evidence of a prior inconsistent statement may be admitted, however, to impeach a witness' testimony on a *noncollateral* matter. . . . A matter is not collateral if it is relevant to a material issue in the case apart from its tendency to contradict the witness. . . . The determination of whether a matter is relevant to a material issue or is collateral generally rests within the sound discretion of the trial court." (Citations omitted; emphasis in original.) *State* v. *Valentine*, 240 Conn. 395, 403, 692 A.2d 727 (1997). "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the trial court's rulings on evidentiary matters." (Internal quotation marks omitted.) *State* v. *Hall*, 66 Conn. App. 740, 757–58, 786 A.2d 466 (2001), cert. denied, 259 Conn. 906, 789 A.2d 996 (2002).

During her trial testimony, the victim indicated that the defendant had not abused her in the past.[6] The victim, however, neither was asked nor testified specifically with regard to the statements she had made to J about prior sexual assaults, and the state did not pursue questioning related to her statements to Conetta.[7] See *State* v. *Richardson*, 214 Conn. 752, 764, 574 A.2d 182 (1990) ("[s]tatements from which a possible inference of inconsistency may be drawn are insufficient for the purpose of impeachment"). Prior to offering extrinsic evidence of the statements through J and Conetta, therefore, the state did not elicit testimony from the victim as to whether she had actually made statements to them, and the victim was never afforded the opportunity to deny or to explain having made the proffered

statements to them.[8] Compare *State* v. *Valentine*, supra, 240 Conn. 399–405 (finding extrinsic evidence to impeach witness' prior inconsistent statement should have been admitted after witness specifically denied making statement related to central issue in case on cross-examination). If, for example, the victim had not denied making the statements during her trial testimony, but rather explained the context of the statements, extrinsic evidence of her statements would have been cumulative. See *State* v. *Bermudez*, 95 Conn. App. 577, 585, 897 A.2d 661 (2006) ("the appellate courts in this state have established that when a witness admits to making a prior inconsistent statement, additional evidence of the inconsistency is merely cumulative"); see also Conn. Code Evid. § 6-10 (c) ("if the witness admits to making the statement, extrinsic evidence of the statement is inadmissible, except in the discretion of the court").

By failing to question the victim adequately about the statements, the state failed to lay a proper foundation for introducing extrinsic evidence to show that the statements had been made. Even in the absence of a foundation, however, it could still be within the discretion of the trial court to admit an impeaching statement. *State* v. *Williams*, 204 Conn. 523, 534, 529 A.2d 653 (1987). Such a failure does not, in itself, end our inquiry.

In determining whether the court exercised its discretion improperly by admitting the testimony, a pertinent question before us is whether the testimony related to a noncollateral matter, that is, whether the testimony was relevant to a material issue in the case apart from its tendency to contradict the victim. See *State* v. *Valentine*, supra, 240 Conn. 403. "Evidence tending to show the motive, bias or interest of an important witness is never collateral or irrelevant. It may be . . . the very key to an intelligent appraisal of the testimony of the [witness]." (Internal quotation marks omitted.) *State* v. *West*, 274 Conn. 605, 641, 877 A.2d 787, cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L. Ed. 2d 601 (2005).

In its January 3, 2006 memorandum of decision, the court made no specific finding that the evidence was relevant for any purpose other than impeachment and no specific finding with regard to the prejudicial impact of admitting the testimony. For the first time, in its supplemental brief,[9] the state argues that the evidence was relevant to matters other than impeachment because it indicated the defendant's prior acts of violence toward the victim, which demonstrates the manifestation of battered woman's syndrome relative to the victim. In other words, the state argues that the victim's recantation at trial was the result of battered woman's syndrome and that, apart from impeachment, it was entitled to present evidence of the defendant's prior acts of uncharged misconduct against the victim to substantiate that she suffered from the affliction. See

State v. *Vega*, 259 Conn. 374, 396–99, 788 A.2d 1221 (concluding acts of defendant's prior misconduct admissible as evidence of escalating pattern of abuse commonly understood to be experienced by battered women), cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002).

Although I view the issue through the lens of impeachment, I am mindful not to engage in a myopic application of impeachment principles without regard to the rules of evidence as a whole. In determining whether the offered evidence is collateral, the state's relevance argument relates to allegations of the defendant's acts of prior uncharged misconduct, which it has raised for the first time in its supplemental brief. Whether the evidence was admitted properly, therefore, requires further analysis.

"As a general rule, evidence of a defendant's prior crimes or misconduct is not admissible. . . . We have, however, recognized exceptions to the general rule if the purpose for which the evidence is offered is to prove intent, identity, malice, motive, a system of criminal activity or the elements of a crime. . . . [Prior misconduct] evidence may also be used to corroborate crucial prosecution testimony. . . . Moreover, we have held that such evidence may be used to complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings. . . .

"To determine whether evidence of prior misconduct falls within an exception to the general rule prohibiting its admission, we have adopted a two-pronged analysis. . . . First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the other crime evidence. . . .

"[An appellate court's] standard of review on such matters is well established. The admission of evidence of prior uncharged misconduct is a decision properly within the discretion of the trial court. . . . [E]very reasonable presumption should be given in favor of the trial court's ruling. . . . [T]he trial court's decision will be reversed only where abuse of discretion is manifest or where an injustice appears to have been done." (Citation omitted; internal quotation marks omitted.) Id., 396–97.

"The trial court's discretion to admit other crimes evidence imports something more than leeway in decision-making. . . . Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . When assessing the admissibility of other crimes evidence, the application of a mechanical test determining that the proffered evidence fits within some class of exception to the rule

of nonadmissibility, may obscure sight of the underlying policy of protecting the accused against unfair prejudice. That policy ought not to evaporate through the interstices of the classification. *The problem is thus one of balancing the actual relevancy of the other crimes evidence in light of the issues and the other evidence available to the prosecution against the degree to which the jury will probably be roused by the evidence.*" (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Sierra*, 213 Conn. 422, 435, 568 A.2d 448 (1990).

In the present case, the state's argument with respect to the admissibility of the testimony is limited to the relevance prong of the analysis.[10] In essence, the state asserts that the evidence of two specific instances of the defendant's prior acts of sexual abuse toward the victim, offered exclusively through indirect testimony of other witnesses, demonstrated that the victim had suffered from battered woman's syndrome and was, therefore, per se admissible. It is the responsibility of the trial court, however, to go beyond the mere application of a mechanical test in determining that the proffered evidence fits within some class of exception to the rule of nonadmissibility. See id.

With regard to the relevance prong of the analysis, the court did not determine that the prior acts were sufficient to constitute a course of conduct. See *State* v. *Vega*, supra, 259 Conn. 398 ("[t]he course of conduct—beginning with minor assault, building to the carving of the name 'Joey' on the victim's chest, and escalating to the horrific events [to which the victim was subjected] was properly offered to prove a system of activity on the part of the defendant"). Moreover, the record reveals that although the court recognized that the evidence was prejudicial,[11] beyond a simple assertion that the testimony was proper for impeachment, we are unable to infer that the court considered the prejudicial effect of the evidence against its probative nature before making a ruling on the admissibility of the evidence.[12] See *State* v. *Nunes*, 260 Conn. 649, 690, 800 A.2d 1160 (2002) ("in order for this test to be satisfied, a reviewing court must be able to infer from the entire record that the trial court considered the prejudicial effect of the evidence against its probative nature before making a ruling"). It is apparent from a review of the transcript that the issue of prior uncharged misconduct was not presented adequately to the court, and that the court did not perform the necessary balancing test to weigh the actual relevance of the other crimes evidence in light of the issues and the other evidence available to the prosecution against the degree to which the jury would probably be roused. See *State* v. *Sierra*, supra, 213 Conn. 436.

Further, in analyzing whether the probative value of the statements outweighed their prejudicial effect, I

am particularly troubled that the state did not take advantage of other evidence available to it, namely, the opportunity to confront the victim directly with the statements.[13] With respect to the probative value of the evidence for impeachment purposes, the state argues that the court properly admitted the testimony because it was relevant to the credibility of the victim's trial testimony in comparison to her *Whelan* statement. As the court explained in its January 3, 2006 memorandum of decision, the jury was presented with two conflicting statements from a key witness and was faced with the responsibility of deciding which version of events or portions thereof to credit. The prior *Whelan* statement, however, did not refer directly to the two prior incidents of sexual abuse.[14] Thus, although the extrinsic impeachment evidence may have served to discredit the victim's trial testimony, it served no function to corroborate the *Whelan* statement.

The central question before the jury was the relative credibility of the victim's *Whelan* statement versus her trial testimony. In light of the fact that the extrinsic evidence had no real bearing on the *Whelan* statement, and to the extent that the impeachment evidence was presented exclusively through extrinsic sources without affording the victim the opportunity to deny or to explain the statements at trial, it likely distracted the jury from the main issue. *State* v. *West*, supra, 274 Conn. 642 ("The general rule precluding the use of extrinsic evidence for impeachment purposes . . . admits of no exception merely because the witness is a key witness. Indeed, the primary reason for the exclusion of such extrinsic evidence, namely, its potential for provoking a minitrial that is likely to distract the jury from the main issues . . . is equally compelling regardless of whether the witness is important." [Citations omitted.]); see also *State* v. *Santiago*, 224 Conn. 325, 340, 618 A.2d 32 (1992) ("[e]vidence should be excluded as unduly prejudicial . . . where it may create distracting side issues" [internal quotation marks omitted]).

Essentially, the court admitted hearsay testimony related to highly prejudicial acts of prior uncharged misconduct,[15] without affording the declarant, who was available to testify, the opportunity to explain having made the statements. Her explanation could well have been critical to the jury's decision whether to believe or to disbelieve her trial testimony. I conclude that, because the state did not lay a proper foundation to admit the extrinsic evidence[16] and because the court did not conduct a balancing test prior to admitting the evidence, the court exercised its discretion improperly by admitting extrinsic evidence of the victim's prior inconsistent statements to impeach her trial testimony.

Although I conclude that the court improperly admitted the evidence, the question remains whether the impropriety was harmful. "When a trial error in a crimi-

nal case does not involve a constitutional violation the burden is on the defendant to demonstrate the harmfulness of the court's error." (Internal quotation marks omitted.) *State* v. *Sierra*, supra, 213 Conn. 436. Our Supreme Court recently stated that "a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Sawyer*, 279 Conn. 331, 357, 904 A.2d 101 (2006) (en banc); see also *State* v. *Michael A.*, 99 Conn. App. 251, 270, 913 A.2d 1081 (2007). "One factor to be considered in determining whether an improper ruling on evidence is a harmless error is whether the testimony was cumulative . . . ." (Internal quotation marks omitted.) *State* v. *Vega*, 48 Conn. App. 178, 192, 709 A.2d 28 (1998). "It is well established that if erroneously admitted evidence is merely cumulative of other evidence presented in the case, its admission does not constitute reversible error." (Internal quotation marks omitted.) *State* v. *Christian*, 267 Conn. 710, 742, 841 A.2d 1158 (2004).

Here, the state argues that evidence that the defendant committed a sexual assault on the victim two weeks prior to the charged incident was introduced also through the testimony of a second police officer, Aaron Trew, and the defendant has not raised any claim of error on appeal regarding the admission of that evidence. The state argues, therefore, that any error is harmless. I disagree.

During Trew's testimony, over defense objection,[17] the officer testified that on the night of the incident, the victim stated that she had been sexually assaulted by the defendant two weeks prior. Conetta testified, however, in significantly greater detail with regard to this prior assault. Specifically, Conetta testified that the victim had told the officer that in the prior incident, the defendant had broken into her home, forced himself on her sexually and "in a sense raped her." Conetta further testified that the victim had indicated that she believed it was too late to do anything about the incident. Moreover, the state presented *no other evidence* related to the first incident of sexual assault occurring in October or November, 2001, about which J testified. The improperly admitted evidence, therefore, was not cumulative.

Because the credibility of the victim's testimony was the central issue in this case, I conclude that the defendant met his burden of showing that the verdict was substantially affected by the improper evidentiary ruling because he has demonstrated that the testimony of the impeachment witnesses, without the victim having had the opportunity to explain her statements, presented a side issue that so distracted the jury as to influence its decision.

Accordingly, I would reverse the judgment of conviction and remand the case for a new trial.

[1] The following colloquy occurred during J's testimony:

"[The Prosecutor]: And let's go into—let's talk a little bit about your relationship with [the victim] and the defendant. We left off yesterday discussing a prior incident that they had had leading up to March 6 of 2002. Could you please tell the jury what that incident was all about?

"[Defense Counsel]: Objection.

"The Court: No, I'm allowing some of this testimony in on the basis of the alleged conflict between the statement of the victim in court and the statement of the victim out of court. But if you would be more specific as to what you're talking about, please.

"[The Prosecutor]: Okay.

* * *

"[The Prosecutor]: All right. So, were there between 1999 and March 6 of 2002, do you know of any other incidences with regard to their relationship?

"[The Witness]: Yes, I know them.

"[The Prosecutor]: Tell us, if you could.

"[Defense Counsel]: Objection, Your Honor.

"[The Prosecutor]: Well, if you remember the approximate month or date. I mean, obviously, this is a long time ago. If you could remember maybe the month or a time frame, a year, or something, or a period, spring, fall.

"[The Witness]: There was many, so, like—I knew because [the victim] always tell me everything, so, I knew what is going on between the relationship.

"[The Prosecutor]: Did she ever confide in you regarding sexual abuse?

"[Defense Counsel]: Objection, Your Honor, totally leading.

"[The Prosecutor]: Judge, it's constancy of accusation here.

"The Court: Pardon me?

"[The Prosecutor]: This is constancy of accusation. She denied all of it yesterday.

"The Court: Concerning a specific incident?

"[The Prosecutor]: Well, yes—

"The Court: That's what constancy of accusation is, as you understand.

"[The Prosecutor]: Yes, Your Honor.

"The Court: All right.

"[The Prosecutor]: All right, I'll rephrase. . . .

"[The Prosecutor]: Did she tell you about any specific dates, times, places, events, where there was sexual abuse?

"[The Witness]: Yes.

"[The Prosecutor]: Tell the jury what you know.

"[The Witness]: Before—

"The Court: Counsel, if this is for constancy of accusation, there is a limit set by the Supreme Court.

"[The Prosecutor]: Yes.

"The Court: Date, time and what she said.

"[The Prosecutor]: Can you remember any dates, or approximate?

"[The Witness]: It was 2000, around 2000.

"[The Prosecutor]: About a year after the incident that you testified to?

"[The Witness]: Not far away, like, six months or so before that.

"[The Prosecutor]: Okay, all right, so, about six months after the incident that you just testified about—

"[The Witness]: Before the—yeah. No, before the March, 2002.

"[The Prosecutor]: About six months before the [incident on] March 6 of 2002?

"[The Witness]: Yeah, yeah, yes.

"[The Prosecutor]: All right, so, we're talking about—I'm not a good mathematician. We're talking about November?

"[The Witness]: Around there.

"[The Prosecutor]: November, December?

"[The Witness]: Around October, November.

"[The Prosecutor]: Okay. What did she tell you about an incident that happened?

"[Defense Counsel]: Judge, objection. That's not specific enough. He gave her the dates.

"[The Prosecutor]: I'm not giving—

"[Defense Counsel]: He named every month and year until she said yes.

"The Court: Pardon me, counsel. I'm going to excuse the jury for a moment. . . . All right, voir dire. Constancy of accusation.

"[The Prosecutor]: Yes.

"The Court: As you know as a prosecutor . . . after a victim testifies concerning a specific act of assault, sexual assault, other people to whom she had complained about the sexual assault are allowed to testify. They're allowed to testify as to what she said about who attacked her and when

the attack occurred.

"[The Prosecutor]: Yes.

"The Court: But that's it.

"[The Prosecutor]: Okay.

"The Court: Not a description of the occurrence.

"[The Prosecutor]: All right.

"The Court: And the reason I'm allowing it is because the last police officer stated in his testimony that the victim had complained to him about a sexual assault and that he referred it to the Norwalk police department."

[2] I do not mean to suggest that I am in favor of a departure from the general rule limiting appellate review of evidentiary questions to the ground presented to the trial judge. It is my view, however, that the facts and circumstances of this case warrant a departure from the well traveled path, although I believe such a detour should be the rare exception.

[3] The state had presented testimony by an expert on violence against women, Evan Stark, who testified, inter alia, that it is quite common when battering is involved that victims of abuse will recant statements that they made in the excitation of the moment of abuse.

[4] As the court stated, "[b]ecause the [victim's] trial testimony and the *Whelan* statement were in such total conflict, and because the jury had to decide which version or portions of which version to credit, the state was permitted to introduce additional evidence of out-of-court statements allegedly made by the victim in order to impeach her trial testimony."

[5] A party may impeach his own witness using prior inconsistent statements. See *State* v. *Williams*, 204 Conn. 523, 530, 529 A.2d 653 (1987).

[6] During the direct examination of the victim, the following testimony was elicited:

"[The Prosecutor]: Did he ever force himself on you sexually?

"[Defense Counsel]: Objection, Your Honor.

"[The Witness]: No."

[7] During the direct examination of the victim, the state asked, "[d]id you at all mention [to the police] that you had been raped two weeks earlier . . . ." After the court sustained a defense objection, the state asked, "[d]o you recall stating that you had been sexually assaulted earlier, some two weeks earlier, and you were told to get looked at either by the doctor or to go to the Norwalk police department . . . ."

This question triggered a hearing outside the presence of the jury on the issue of whether to admit the victim's prior statement to the police under *Whelan*. When the victim's testimony resumed, however, the state did not pursue this questioning, and no response was ever elicited from the victim.

[8] During the state's questioning of the victim, the state did impeach her trial testimony with her *Whelan* statement. Relative to her written statement, the state asked, "Because it says in the statement that you indicated to the police physical, mental, emotional, sexual abuse, did you tell the police that?" The victim responded, "No." The state did not ask the victim specifically about her statements to Conetta on the way back from the hospital.

[9] At trial, the state argued that the evidence was admissible as constancy of accusation testimony. In its main appellate brief and at oral argument, the state argued that the defendant's argument was without merit because the court admitted the evidence for the purpose of impeachment.

[10] In the impeachment context, even if the evidence is relevant, it is still subject to a balancing test. See 1 C. McCormick, Evidence (6th Ed. 2006) § 49, p. 238.

[11] Recognizing the potential prejudicial impact, the court specifically limited the testimony that the victim had stated that the defendant forced her to have sex with him on two occasions, but did not permit testimony as to the specifics.

[12] For example, the court gave no specific instruction to the jury after the testimony on the limited use of the evidence in order to safeguard against misuse and to minimize the prejudicial impact. Compare *State* v. *Kulmac*, 230 Conn. 43, 63, 644 A.2d 887 (1994).

[13] The state made some effort to question the victim about the specific instances of prior sexual abuse, to which it received little response, but the state never pursued any questioning of her related to whether she had made such claims to the impeachment witnesses.

[14] In the *Whelan* statement, which was read to the jury, the victim stated that "[the defendant] and I have had a lot of domestic problems during our last four years together, including two prior incidents where [the defendant] was arrested for hitting me. . . . Because of the physical, mental and sexual abuse I have received recently, I have decided to break off the relationship . . . ." This is the only part of the statement that implies that the prior

sexual assaults had occurred.

[15] "The inherent danger in allowing evidence of the defendant's prior bad acts is the tendency of the jury to believe that the defendant had a predisposition to commit the crime with which he is now charged." *State* v. *Santiago*, supra, 224 Conn. 340.

[16] Ordinarily, the issue of lack of proper foundation must be raised by the defendant before the trial court. See *State* v. *Teel*, 42 Conn. App. 500, 504, 681 A.2d 974, cert. denied, 239 Conn. 921, 682 A.2d 1012 (1996). Here, however, the state's failure to lay a proper foundation pertains to the prejudicial effect of admitting the prior inconsistent statements through extrinsic sources, without first confronting the victim with the statements.

[17] Simply because the defendant has not raised the issue on appeal does not merit the conclusion that the evidence was validly admitted. Compare *State* v. *Calderon*, 82 Conn. App. 315, 326, 844 A.2d 866 ("the record reveals that the substance of what the defendant claims was improperly admitted testimony merely was cumulative of other *validly admitted evidence*" [emphasis added]), cert. denied, 270 Conn. 905, 853 A.2d 523, cert. denied, 543 U.S. 982, 125 S. Ct. 487, 160 L. Ed. 2d 361 (2004).